

1997

Boyd J. Brown and Interwest Aviation Corporation
v. David K. Richards & Company and David K.
Richards : Brief of Appellant

Utah Court of Appeals

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I hereby certify I am a member of and/or employed by the law firm of Campbell Maack & Sessions, 201 South Main Street, Thirteenth Floor, Salt Lake City, Utah, 84111 and that in said capacity and pursuant to Rule 25, Federal Rules of Appellate Procedure, that two true and correct copies of the attached BRIEF OF APPELLANTS were served upon the following:

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Dr. Eugene C. Os

**BOYD J. BROWN, an individual;
and INTERWEST AVIATION
CORPORATION, a Utah corporation,**

VS.

DAVID K. RICHARDS & COMPANY;
and DAVID K. RICHARDS, an
individual.

Defendants, Appellants, and Cross-Appellees.

Case No. 970536-CA

Priority No. 15

APPEAL FROM THE JUDGMENT OF THE
THIRD DISTRICT COURT, SALT LAKE COUNTY,
DISTRICT JUDGE KENNETH RIGTRUP
BY DISTRICT JUDGE STEPHEN L. HENRIOD, PRESIDING

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JURISDICTIONAL STATEMENT

This is an appeal by David K. Richards & Company, David K. Richards, individually (hereinafter “Richards”) from a Post-Appeal Judgment (Post Reconsideration) of March 21, 1997, incorporating a Minute Entry prepared by District Judge Kenneth Rigtrup dated December 31, 1996. The judgment was actually prepared and signed by District Judge Stephen L. Henriod because of Judge Rigtrup’s retirement. The appeal is taken against Boyd L. Brown (hereinafter “Brown”) and Interwest Aviation Corporation (hereinafter “Interwest”) with respect to attorneys fees and costs under the Asset Sale and Purchase Option Agreement (hereinafter “Asset Sale Agreement”).

Jurisdiction rests in this Court pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1996).

STATEMENT OF THE ISSUES

QUESTION ON APPEAL No. 1

WHETHER DISTRICT JUDGE RIGTRUP ERRED IN FAILING TO AWARD RICHARDS, AS THE “PREVAILING PARTY”, HIS ATTORNEYS FEES AND COSTS INCURRED IN SUCCESSFULLY PROVING RICHARDS’ FAILURE OF SUBSTANTIAL PERFORMANCE DEFENSE TO THE BREACH OF CONTRACT CLAIMS OF BROWN AND INTERWEST UNDER THE ASSET SALE AGREEMENT.

Standard of Review

The standard of review is correction of error. Carlie v. Morgan, 922 P.2d 1, 3 (Utah 1996) (questions of law are granted no particular deference but are

reviewed for correctness); Sackler v. Savin, 897 P.2d 1217, 1220 (Utah 1995) (questions of contract interpretation not requiring resort to extrinsic evidence are matters of law and are subject to correction of error standard of review).

Issue Preservation

Richards preserved this issue through his request for fees in his Memorandum in Support of Motion for Amended Judgment (Corrected) (“Amended Judgment Memorandum”). R5123-39. Richards also raised this issue in his Objection to Plaintiff’s Proposed Findings of Fact and Conclusions of Law and Memorandum in Support of Richards’ Motion for Further and Reconsideration (“Objection”). R5600-01.

QUESTION ON APPEAL NO. 2

WHETHER THE DISTRICT JUDGE ERRED IN FAILING TO AWARD RICHARDS ALL OF HIS REASONABLE FEES INCURRED IN PROVING HIS BREACH OF WARRANTY CLAIMS UNDER THE ASSET SALE AGREEMENT BECAUSE RICHARDS’ PROOF OF HIS BREACH OF WARRANTY CLAIMS ALSO PROVED RICHARDS’ FRAUD CLAIM.

Standard of Review

The standard of review is correction of error. Carlie, 922 P.2d at 3.

Issue Preservation

Richards preserved this issue through his request for fees in his Amended Judgment Memorandum. R5123-39. Richards also raised this issue in his objection. R5600-01.

QUESTION ON APPEAL NO. 3

WHETHER THE DISTRICT JUDGE ERRED IN AWARDING RICHARDS ONE-HALF OF THE AMOUNT THE COURT

PREVIOUSLY AWARDED RICHARDS FOR FEES AND COSTS AT TRIAL WITHOUT MAKING THE DETAILED FINDINGS OF FACT AND CONCLUSIONS OF LAW REQUIRED BY THIS COURT.

Standard of Review

The standard of review is correction of error. Selvage v. J.J. Johnson & Assoc., 910 P.2d 1252, 1257 (Utah App. 1996) (whether trial court's findings of fact in support of award of attorneys fees are sufficient is question of law, reviewed for correctness).

Issue Preservation

This issue was raised by Judge Rigtrup's December 1996 Minute Entry and preserved by Richards' Notice of Appeal. Addendum ("Add.") B., R5886-88.

QUESTION ON APPEAL No. 4

WHETHER THE DISTRICT JUDGE ERRED IN AWARDING RICHARDS ONLY 60% OF THE FEES AND COSTS INCURRED ON HIS PRIOR SUCCESSFUL APPEAL IN LIGHT OF THIS COURT'S HOLDING THAT, WITH THE EXCEPTION OF ONE LIMITED ISSUE, RICHARDS WAS THE PREVAILING PARTY ON APPEAL.

Standard of Review

The standard of review is correction of error. See Carlie, 922 P.2d at 3.

Issue Preservation

Richards preserved this issue through his request for fees in his Application for Attorneys Fees and Costs Incurred on Appeal. R4541-50. Richards also raised this issue in his Objection. R5605-06.

QUESTION ON APPEAL No. 5

WHETHER THE DISTRICT JUDGE ERRED IN AWARDING RICHARDS ONLY 60% OF THE FEES AND COSTS INCURRED ON

HIS PRIOR SUCCESSFUL APPEAL WITHOUT MAKING FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF THE AWARD.

Standard of Review

The standard of review is correction of error. See Selvage, 910 P.2d at 1257.

Issue Preservation

This issue was raised by Judge Rigtrup's December 1996 Minute Entry and preserved by Richards' Notice of Appeal. Add. B; R5886-88.

QUESTION ON APPEAL No. 6

WHETHER THE DISTRICT JUDGE ERRED IN AWARDING RICHARDS ONLY 60% OF THE FEES AND COSTS INCURRED IN PROVING HIS ATTORNEYS FEES UPON REMITTITUR FROM THIS COURT

Standard of Review

The standard of review is abuse of discretion. Matter of Quinn, 830 P.2d 282, 286 (Utah App. 1992).

Issue Preservation

Richards preserved this issue through his request for fees in his Amended Judgment Memorandum. R5148-50. Richards also raised this issue in his Objection. R5601-04.

QUESTION ON APPEAL No. 7

WHETHER THE DISTRICT JUDGE ERRED IN FAILING TO FOLLOW THE LAW OF THE CASE WHEN IT APPLIED A DIFFERENT DEFINITION OF THE WORD "COSTS" AS USED IN THE ASSET SALE AGREEMENT THAN IT HAD PREVIOUSLY APPLIED WHEN AWARDING BROWN AND INTERWEST

AVIATION COSTS UNDER AN IDENTICAL ATTORNEYS FEE PROVISION.

Standard of Review

The standard of review is correction of error. See Carlie, 922 P.2d at 1, Sackler, 897 P.2d at 1220.

Issue Preservation

Richards preserved this issue through his request for fees in his Amended Judgment Memorandum. R5139-42. Richards also raised this issue in his Objection. R5597.

QUESTION ON APPEAL No. 8

WHETHER THE DISTRICT JUDGE ERRED IN AWARDING BROWN AND INTERWEST AVIATION ATTORNEYS FEES FOR WORK ALREADY INCLUDED IN THE TRIAL COURT'S MAY 1990 ATTORNEYS FEE AWARD.

Standard of Review

The standard of review is abuse of discretion. See Quinn, 830 P.2d at 286.

Issue Preservation

Richards preserved this issue in his Memorandum in Opposition to Plaintiff's Motion for Supplemental Attorneys Fees. R5066-5070.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

There are no constitutional provisions, statutes, ordinances, rules or regulations the interpretation of which are determinative of this appeal.

STATEMENT OF THE CASE

Nature of the Proceedings

This is the second appeal to this Court of what has now become an aged case arising from the sale of a building and the business assets of a fixed-base operation at the Salt Lake International Airport by Brown and Interwest to Richards. See Brown v. Richards, 840 P.2d 143 (Utah App. 1992), (Add. A). Brown and Interwest, sellers, sued Richards, buyer, claiming that Richards breached the contracts for the sale of the building and assets. R1762-1942. Richards defended against the contract actions by contending that Brown had failed substantially to perform under the contracts, thereby excusing Richards' performance. Richards also counterclaimed against Brown for fraudulent misrepresentation as well as for negligent misrepresentation and breach of warranty in connection with the contracts of sale. Richards also counterclaimed for breach of fiduciary duty by Brown during a one-year period when Brown and Richards jointly owned the business and building. R2240-77.

The case was originally tried to a jury before District Judge Kenneth Rigrup for eight weeks commencing February 28, 1989. The jury returned its answers to special interrogatories on April 22, 1989. R2808-21. Judge Rigrup entered his initial judgment on December 21, 1989. R3090-116. After further briefing and hearings, Judge Rigrup entered a Final Judgment on October 18, 1990, awarding prejudgment interest on the various awards and attorneys fees to both parties under the contracts at issue. R4072-102.

Richards appealed and Brown cross-appealed the final judgment of Judge Rigtrup. This Court decided the appeal on August 24, 1992. This Court concluded that Richards had prevailed on every issue but one minor issue. Attorneys fees and costs on appeal were therefore awarded by this Court in general to Richards and in very limited part to Brown. Add. A, Brown, 840 P.2d at 156-57. This Court also vacated the award of trial attorneys fees to Richards on the grounds that Judge Rigtrup's findings were too general to support the award and the case was remitted for recalculation of attorney fees based on specific Findings of Fact and Conclusions of Law. Id. at 156.

Brown thereafter filed before this Court a petition for rehearing. When that was denied, Brown filed a petition for writ of certiorari to the Utah Supreme Court, which was likewise denied on March 23, 1993. R4318. The case was thereupon remitted back to District Court. R4316.

After receiving evidence by affidavit from Richards, on April 12, 1994, and then 10 months later, on January 31, February 1, 2, and 3, 1995, Judge Rigtrup held repetitive and protracted evidentiary hearings and argument on Richards' request for attorneys fees in the trial court and on appeal. Without making the specific Findings of Fact and Conclusions of Law mandated by this Court in the initial appeal, Judge Rigtrup thereafter took and kept the matter under advisement until his retirement from the Bench on December 31, 1996, when he prepared a Minute Entry. In the Minute Entry, Judge Rigtrup awarded one-half of the attorneys fees and costs he had previously awarded Richards for work through trial. Add.

B. Judge Rigtrup further, without adequate Findings or Conclusions, awarded Richards a flat 60% of Richards' fees and costs incurred on appeal to this Court and 60% of Richards' fees and costs for over three and one-half years of post-appeal work on attorney fees. Add. B at 2,5.

Judge Rigtrup retired on December 31, 1996 and this case was assigned to Judge Stephen L. Henroid. On March 21, 1997, Judge Henroid entered Findings of Fact and Conclusions of Law and a Post-Appeal Judgment (Post-Reconsideration) incorporating all of Judge Rigtrup's December 31 Minute Entry. Add. B, C. Richards filed a Notice of Appeal on April 7, 1997. R5586-88.

Statement of Facts

1. Background - The Two Contracts of Sale

In April 1984, Brown entered into two separate agreements with Richards for the sale of (1) the Interwest business assets (the Asset Sale Agreement) and (2) the Interwest building and concessionaire lease (the Exchange Agreement and Option Agreement). In each case Richards bought partial ownership and obtained an option to purchase the remaining portion. Exs. P2, P6, P7. Richards also obtained an option to purchase a second nearby building known as the Executive Building. Ex. P7; Add. A, 840 P.2d at 146. Each contract contained an attorneys fee clause providing for the recovery of attorneys fees and costs to the prevailing party in any action brought under the contract. Exs. P6 and P7.

From July 1984 through June 1985, Brown and Richards jointly owned Interwest as provided by the Asset Sale Agreement. Exs. P6 and P11. However, Brown was primarily responsible for day-to-day management. R4200 at 733-34; R4204 at 1394-96; 1404-05. In spring and summer 1985 Richards exercised his options to purchase the second half of the Interwest business assets and the remaining portion of the Interwest building. R4204 at 1319-21; Add. A, 840 P.2d at 146.

From April 23, 1984 through April 1, 1986, Richards made principal and interest payments on the Interwest assets and building totaling \$218,235. D269. Thereafter Richards refused to make any further payments because of his conclusion that Brown had not substantially performed his side of the bargain. Brown sued Richards, seeking recovery on the Asset Sale Agreement, the Option Agreement, and a claimed oral agreement to add \$500,000 to the sale price of the assets in the event Richards did not exercise his option on the Executive Building. R1762-1942. Richards defended the contract action on the basis that Brown had failed substantially to perform the agreements; Richards also counterclaimed against Brown for fraud, negligent misrepresentation, breach of warranty and breach of fiduciary duty. R2240-77; Add. A at 146.

2. The Jury Trial in 1989.

The case was tried to a jury for eight weeks from February 28, 1989 through April 22, 1989. At trial Richards' primary defense against Brown's breach of contract claims was Brown's fraudulent misrepresentations and breach of warranties, and consequent failure of

substantial performance under the contracts. At the end of Brown's case-in-chief, the court granted Richards a directed verdict on Brown's claim that Richards breached his agreement to purchase the Executive Building, finding as a matter of law that Richards did not exercise the option. R4203 at 1131-32.

Richards proved that Brown did not substantially perform the Asset Sale Agreement because the business and assets transferred to Richards were so significantly less valuable and profitable than represented by Brown that the transfer did not constitute performance. Richards' evidence included proof that during the sale negotiations, Brown gave Richards financial statements, including one showing the "book value" net worth of the Interwest business as of June 30, 1983, as \$371,444, R4203 at 1182, Ex. D93, and another showing its "appraised value" as of the same date at \$898,479. R4203 at 1207-08, Ex. D92. Richards proved that the "appraised value" balance sheet was materially false. In the negotiations Brown repeatedly claimed that the Interwest business was worth \$1,500,000. R4203 at 1187-88; 1205-09. At trial Richards proved through expert testimony that in fact the business was worth only \$255,869. R4218 at 3692-3708 and Ex. D298.

Richards also proved that Brown fraudulently misrepresented that Interwest could pay Richards \$12,500 per month rent if Richards purchased the Interwest building. R4204 at 1255-56; 1284-85. Richards established that historically the business never made enough money to meet the building rental obligation and that in many previous years Brown had accepted additional Interwest stock in lieu of rent. R4209 at 2133-34.

Richards proved Brown fraudulently misrepresented that the charter department was profitable and well managed and that while aircraft sales had been slow, they were turning around and would be profitable. R4203 at 1188; 1199-1200; 1225-26. In particular, Brown told Richards that a Gulfstream Commander aircraft had been sold for \$135,000 profit and that payment on that sale was imminent. R4204 at 1272-73. In fact, the charter department profit shown on the books resulted from Interwest's failure to reflect depreciation and the maintenance cost of aircraft flown in charter, and the department was actually losing money. R4204 at 1325; R4225 at 4924. Further, contrary to Brown's representations, the sale of the Gulfstream Commander had fallen through in March 1984 but Brown instructed Interwest's accountant not to reflect the lost sale in the Interwest books until after the sale to Richards. R4204 at 1351-54; R4209 at 2192-93. Brown fraudulently misrepresented that in 1983 and early 1984 the Interwest fuel facility was adequate to meet Interwest's needs and needed only minimal repairs. R1274. Richards proved that in late 1983 and early 1984, the "fuel farm" leaked fuel and had been cited by the Salt Lake City International airport fire department because of its dangerous condition. R4204 at 1365-66; R4213 at 2909-11.

Richards proved that these and other statements and conduct of Brown breached the contract as well as express written and oral warranties made in connection with the sale of the Interwest assets, including warranties concerning the financial statements, condition of equipment, accounts receivable, contingent liabilities and the representations made in connection with the sale. Richards proved that Brown's statements and conduct in

connection with the sale of the business assets also constituted fraud and negligent misrepresentation.

Richards also proved that during the year of joint ownership, Brown breached his fiduciary duty to Richards by entering into business transactions which Brown thought were in his own personal best interests but were not in the best interests of the joint venture, including misusing a line of credit at Valley Bank for which Richards was personally liable. R4204 at 1396-1401; R4205 at 146.

3. The Jury Verdict of April 22, 1989.

The jury returned its verdict on special interrogatories on April 22, 1989. R2808-21. On Brown's claim that Richards breached the contract to purchase the Interwest business assets, the jury found that Brown had not substantially performed his agreement, and therefore did not consider the issues of Richards' breach or damages. R2808-09. The jury found that Brown committed fraud and negligent misrepresentation in the sale of the Interwest assets and awarded Richards compensatory damages of \$500,000. R2813-17. The jury also awarded punitive damages in the amount of \$550,000 on the fraud claim. R2817. The jury further found that Brown had breached warranties in connection with the sale of the Interwest assets and awarded Richards \$100,000 in damages. R2819-20.

On Brown's claim that Richards breached the contract to purchase the Interwest building, the jury found that Brown had substantially performed his agreement. R2809. The jury then found that Richards had breached the contract to purchase the Interwest building

and awarded Brown the contract price as damages. R2810. The jury found that Brown did not commit fraud or negligent misrepresentation or breach any warranties in connection with the sale of the Interwest building to Richards. R2812, 2814, 2818.

4. The Trial Court's Judgment.

Judge Rigtrup held five hearings over the next five months to settle the judgment and finally entered judgment on December 20, 1989. Notwithstanding the jury's verdict, the trial court entered judgment for Brown on his contract claims arising from the Asset Sale Agreement, including his claim of an oral agreement for a \$500,000 increase in the price of the assets. R3106-09. The trial court also refused to award Richards' his \$100,000 breach of warranty damages, on the ground the award was duplicative of Richards' fraud award. R3113. The jury verdict had awarded Richards \$1,450,000 and Brown \$654,046 in damages. R2808-21. The December 1989 Judgment awarded Richards \$1,350,000 and Brown \$1,877,259. R3090-116.

Issues of attorneys fees and costs and interest had been reserved by both parties to be determined by the court after liability and damages were determined by the jury. Therefore, after further briefing the trial court ruled at a hearing on May 29, 1990 that Richards was the prevailing party on the Asset Sale Agreement and, pursuant to the Agreement's attorney fee provision, Richards was entitled to attorneys fees and costs in the amount of \$435,000. R4228 at 5409, 5412. The court determined that Brown was the prevailing party on the Option Agreement, to the extent that it related to the purchase of the Interwest building and

payment of rent on the Executive Building, and pursuant to that Agreement's attorney fee provision, awarded Brown attorneys fees and costs in the amount of \$250,000. Id. at 5410; 5412. The trial court entered a Final Judgment on Special Interrogatories to the Jury and Ancillary Matters, which incorporated his rulings on prejudgment interest and attorneys fees on October 18, 1990. R4072-102.

5. The First Appeal to this Court.

Richards appealed to reinstate the jury's verdict denying Brown recovery on his contract claims under the Asset Purchase Agreement and awarding Richards \$100,000 on his breach of warranty claim. Brown cross-appealed to overturn the jury verdicts in Richards' favor on Richards' fraud, negligent misrepresentation and breach of warranty claims in connection with the sale of the assets and on Richards' breach of fiduciary duty claim. Brown also appealed the award of attorneys fees and costs to Richards.

On appeal before this Court, Richards prevailed on every issue which he raised, except his argument that he could retain the fraud award without paying anything additional for the business assets. Add. A, 840 P.2d at 156. This Court ruled that Richards' \$500,000 fraud judgment should be set off against the \$900,000 purchase price of the assets to determine the amount Brown could recover for the assets. Id. at 151. Conversely, Brown lost on every issue which he raised on appeal except his claim that he was entitled to attorneys fees on contracts, other than the Asset Sale Agreement, which Richards tried and failed to rescind. Id. at 156. On that issue, this Court concluded that Brown could recover

if he could prove he incurred fees in successfully defending against the rescission of contracts other than the Asset Sale Agreement, provided such contracts contained attorneys fees provisions. Id. at 155. Finally, with respect to Brown's challenge to the award of attorneys fees to Richards, this Court ruled that the trial court's findings were "simply too sparse for [it] to determine whether the trial court made a permissible award." Id. at 156. It therefore vacated the award of attorneys fees and remitted to the trial court for calculation and entry of supporting Findings of Fact and Conclusions of Law. Id.

This Court also ruled that Richards was successful on each major issue and was therefore the prevailing party and entitled to recover his attorneys fees on appeal, with the exception of fees incurred in defending against Brown's claim that he was entitled to attorneys fees for successfully defending Richards' attempts to rescind other contracts. On that one limited issue Brown was awarded attorneys fees. Id. at 156-57.

6. Proceedings on Remittitur

After Brown unsuccessfully petitioned the Supreme Court for certiorari to review the decision of this Court, the matter was remitted to the trial court on March 23, 1993. R4316. Richards filed his Bill of Costs on appeal on April 12, 1993, R4319-23, and his Application for Attorneys Fees and Costs Incurred on Appeal on September 17, 1993. R4541-51. On December 9, 1993, Richards filed a Motion for Entry of Amended Judgment and Memorandum in support thereof. R4869-4909. The Memorandum set out a purchase price for the business assets recalculated as directed by this Court, the prejudgment and

postjudgment interest to which Richards was entitled on his breach of warranty award and a detailed analysis of the attorneys fees incurred by Richards in the trial court.¹ Id. With that Memorandum Richards provided copies of all bills for legal work done in the trial court.

In making his fee request, Richards divided the fees incurred into fourteen categories: 1) factual development and discovery scheduling; 2) preparation of answer and counterclaims; 3) plaintiffs' discovery; 4) defendants' discovery; 5) plaintiffs' pretrial motions; 6) damages; 7) defendants' pretrial motions; 8) jury instructions and special interrogatories; 9) general trial preparation and trial; 10) preparation of judgment and related issues; 11) post-judgment motions; 12) petition for writ of mandamus; 13) negotiation concerning possible sale of Interwest and other non-litigation services; and 14) attorneys fees. R5125-39. Many of the categories were broken down into subcategories detailing work done on specific pleadings. In each category Richards apportioned fees between those incurred for work done on claims for which Richards was entitled to fees and fees incurred for work done on claims on which Richards was unsuccessful or for which there was no contractual or statutory basis for an award of fees. The Memorandum set out the precise basis for the apportionment, the total amount of fees in the category, the reductions made and the amount of fees sought. Id.

¹Richards filed a corrected Memorandum on April 1, 1994, correcting its calculations of post-judgment interest to conform to the contract rate. R5117-56.

Richards' substantial performance defense and breach of warranty, fraud and negligent misrepresentation claims shared a common factual basis and legal work. Because time incurred in proving both Richards' substantial performance defense and breach of warranty claim was compensable, and because proof of the common factual basis would have been required whether or not Richards brought a fraud claim, Richards sought to recover for all fees incurred in proving this common factual basis, in addition to any time spent specifically on the compensable claim and defenses. Richards eliminated from his fee request any time that went exclusively to the fraud, negligent misrepresentation or breach of fiduciary duty claims. Richards also eliminated any time spent in connection with the claims on which he was unsuccessful. Id.

Costs were divided into six categories: 1) long distance telephone calls; 2) filing fees; 3) witness fees; 4) photocopies; 5) miscellaneous costs; and 6) SOS temporary services. The costs were apportioned in the same way that the fees were. R5139-42.

The bills submitted with the Memorandum were highlighted to show time entries which were eliminated because the time was spent on noncompensable work and time entries which were reduced because some portion of the time was spent was on noncompensable work. R4613-858. The percentage reduction and time subtracted in tenths of hours was noted next to the original time entry. A summary sheet attached to each bill showed the total fees and costs billed on that invoice, fees and costs reduced or omitted, and the total fees and costs sought. Id.

Judge Rigrup held a hearing on Richards' Motion for Entry of Amended Judgment on April 12, 1994, and permitted Brown to call one of Richards' attorneys, Elizabeth Dunning, to cross-examine her concerning the methodology and calculations set out in the Memorandum and its exhibits. R6047 at 1-73. At the end of the hearing, the District Judge gave Brown leave to continue his examination by deposing Elizabeth Dunning. Id. at 73. The deposition was taken on April 20, 1994.

Brown moved for partial summary judgment on several prejudgment interest issues raised by Richards' Memorandum in Support of Motion for Amended Judgment. R5168-82. That motion was heard on August 29, 1994, and Judge Rigrup made a preliminary ruling on the prejudgment interest issues at that time. R5302-06.

Brown requested an evidentiary hearing on Richards' requests for attorneys fees, which was held on January 31 and February 1, 2 and 3, 1995. At that hearing, Richards' counsel testified about their education and experience, about the staffing of the case and about the methodology used to apportion fees between those which were recoverable and those which were not. This testimony included an explanation of the fourteen (14) categories of fees, how the allocation between recoverable and non-recoverable fees was made, the manner in which trial time and witness preparation time during trial was analyzed and fees eliminated or reduced for witnesses whose testimony went wholly or in part to claims for which fees were not available. R6049 at 13-71; 130-57; R6050 at 165-77.

Richards' evidence that approximately \$540,000 in recoverable fees and costs were incurred through April 1990 in successfully defending against Brown's claim on the contract for sale of the business assets and in proving Richards' breach of warranty claim was unrebutted. Richards' evidence of approximately \$136,000 in fees and costs incurred in prevailing on the appeal and \$78,000 in fees and costs incurred in post-appeal proceedings was also unrebutted.

In support of these amounts Richards presented the expert testimony of Harold G. Christensen, Esq. of Salt Lake City. Mr. Christensen, with years of trial experience in complex, commercial litigation, testified that the rates charged by Richards' attorneys were reasonable for their experience and expertise, that the total amount of time spent on the litigation both at trial and on appeal was reasonable and that, considering the difficulty of the litigation, the amount involved and the result attained, the fees requested were more than reasonable. Mr. Christensen further testified that the methodology employed to apportion time spent between compensable and noncompensable tasks was reasonable and typically employed in the Salt Lake legal community. R6050 at 292-319. Lastly, Mr. Christensen gave evidence that often in complex commercial litigation, legal work performed may relate to more than one or even a number of issues. R6050 at 313-15. Mr. Christensen's testimony was unrebutted.

Brown offered only the testimony of George Naegle, a Salt Lake attorney who represented insurance companies. Mr. Naegle testified that by the late 1980's, insurance

companies did not permit their independent, retained lawyers to engage in “block billing”.

Id. at 282-83. Mr. Naegle defined block billing as recording only a daily total of time for all tasks performed rather than separately recording time spent on each specific task performed that day. Id. at 282. Richards objected to Mr. Naegle’s testimony on the grounds that the instant case involved complex commercial litigation performed not for an insurance company but for a private commercial client. R6050 at 278-82.

Brown also called David Thompson, an assistant attorney general in the criminal appeals division, who prepared and supervised preparation of briefs for the State of Utah in criminal cases. On Richards’ objection, Judge Rigtrup refused to allow Mr. Thompson to render any opinion regarding the reasonableness of Richards’ appellate fee request. R6051 at 405-06. Enigmatically, Judge Rigtrup, in his December 31 Minute Entry, cited to and relied upon the Thompson testimony that he had excluded at the evidentiary hearing. Add. B at 5, ¶14. Finally, Bruce Coke, on rebuttal, testified briefly regarding Brown’s original fee application and why the number of attorney hours spent by Brown did not validate the number of attorney hours spent by Richards. R6051 at 409-31.

7. Judge Rigtrup’s Post-Appeal Minute Entry of December 1996.

After the evidentiary hearing in early February 1995, Judge Rigtrup kept the matter under advisement for fourteen months and on April 1, 1996, indicated what his ruling would be from the Bench. Believing that the oral announcement indicated that in the passage of time Judge Rigtrup had forgotten or overlooked evidence and his prior rulings, Richards filed

a Motion for Further and Reconsideration. R5585-88. Judge Rigtrup heard oral argument on Richards' motion on June 17, 1996. R6054. Judge Rigtrup retired from the bench on December 31, 1996, without issuing an opinion or decision. In a Minute Entry dated December 31, 1996 but not mailed to the parties until January 17, 1997, Judge Rigtrup gave his ruling on the issues of attorneys fees, costs and interest. Add. B.

Notwithstanding Judge Rigtrup's findings at the April 1, 1996 hearing that the rates charged by Richards' attorneys were reasonable and the amount of time spent on the case through trial was reasonable, Judge Rigtrup awarded Richards only \$218,486.42 for work performed through April 1989, or approximately one-half of the amount the judge had previously awarded. Add. B at 2. No Findings of Fact or Conclusions of Law were made by Judge Rigtrup in support of his award as required by this Court in Brown.

Again without any specific Findings of Fact and Conclusions of Law, Judge Rigtrup awarded Richards only 60% of the attorneys fees incurred by Richards' on appeal, noting that Brown had prevailed on "several issues." Judge Rigtrup further awarded Richards' only 60% of the fees he incurred for post-trial work relating to the attorneys fee application, noting that since such time was not entered and accounted for by specific tasks, allocation between compensable and non-compensable time was more difficult. Add. B at 3-5. All of Richards' post-appeal fees were incurred in connection with the recovery of attorneys fees attributable to the breach of contract issues on which Richards prevailed.

On Judge Rigtrup's retirement, Judge Henroid did not disturb the decisions set out in the Minute Entry of December 31, but simply entered on March 21, 1997 Findings of Fact and Conclusions of Law and a Post-Appeal Judgment (Post-Reconsideration) based thereon. Add. B and C. Richards appealed the March 21, 1997 Judgment on April 7, 1997.

SUMMARY OF THE ARGUMENT

As this Court recognized and affirmed without equivocation in the earlier appeal in Brown, under the jury verdict of April 22, 1989, Richards not only prevailed in demonstrating a lack of substantial performance by Brown under the Asset Sale Agreement which placed Brown in breach of that Agreement, but also prevailed on his counterclaims of fraud, breach of warranty and negligent misrepresentation. The evidence of fraud, misrepresentation and breach of warranty which proved Brown's lack of substantial performance on his contract claims also was the foundational evidence of Richards' successful counterclaims. This Court found that Richards was the prevailing party on Brown's contract claims, thus entitling Richards to all his reasonable attorneys fees and costs in that defense. The Court also affirmed a fraud verdict of \$500,000 and a \$100,000 breach of warranty verdict against Brown in favor of Richards, and a \$550,000 punitive damage award against Brown. Consistent with the commonality of evidence in Richards' defense of Browns' contract claims and Richards' fraud and breach of warranty evidence against Brown under the counterclaims, this Court deducted the jury's fraud verdict of \$500,000 against

Brown from the initial contract price of \$900,000 for the purchase price of the Interwest assets. Also, in the earlier appeal in Brown, this Court squarely reversed Judge Rigtrup's finding that Brown, not Richards, was the prevailing party on the Interwest Agreement:

Despite the jury's finding that Brown did not substantially perform the Interwest Purchase Agreement, the trial court awarded Brown the contract amount plus interest just as if he had prevailed on his claim against Richards. (Emphasis added).

Brown, 147. On remand, however, after four and one-half years of protracted delay and despite this Court's express finding in Brown that Richards was entitled to recover all fees and costs incurred in defeating Brown's Asset Sale Agreement claims, the trial judge has again refused to award Richards those fees incurred at trial in defeating Browns' contract claims based on the fact that Richards' proof of successful contract defense and affirmative claims for fraud, misrepresentation and breach of warranty relied on a common factual basis. That is an egregious error which must be rectified by this Court in this Appeal.

The trial court erred in light of the overwhelming evidence of the reasonableness of Richards' reasonable attorneys fees of \$540,000, and slashed, by exactly 50%, the attorneys fees which the trial judge had earlier awarded, but without making specific findings and conclusions. Thus, the flaw of the initial judgment is inherent as well in the instant judgment from which this Appeal is taken, for there is an equal failure upon the part of the trial judge to make specific findings and conclusions as to the basis for the attorneys' fee award to Richards as the prevailing party. Not only is this award just 50% of the prior attorneys fee

award, but it is over \$30,000 less than the attorneys' fees awarded to Brown who was not the prevailing party in the case.

The trial judge did not stop there in his prejudicial error.

The trial judge also erred in awarding Richards only 60% of the attorneys' fees and costs incurred in the prior appeal in which this Court firmly held that Richards was the prevailing party on appeal and entitled to all appellate fees incurred with the exception of those on one limited issue of rescission. The trial judge also prejudicially erred in arbitrarily awarding Richards only 60% of his attorneys fees and costs incurred in post-appeal proceedings. Those fees were reasonably and fully incurred in the hearings and evidence incident to Richards' fee application. The decisional precedent of both the Utah Supreme Court and this Court have made abundantly clear that such fees are compensable. That the trial judge clearly misunderstood the practical aspects of formulating Richards' fee application is one thing. For the trial judge to have arbitrarily slashed 40% of Richards' fees and costs without making any specific findings and conclusions, constitutes prejudicial error requiring a reversal and remittitur.

Judge Rigtrup further erred in determining that Richards could recover only those costs and expenditures allowed by Utah Rule of Civil Procedure 54 in direct contravention of his own previous ruling — which was not appealed in Brown — that the expanded and practical definition of the term “costs” was to be applicable, just as it was applicable with respect to the recovery by Brown of all of his reasonable costs. The trial court's ruling

patently discriminates against Richards and is manifestly unjust, which discrimination and injustice must be corrected once again in this Appeal.

The trial judge compounded his prejudicial error in making an award of supplemental attorneys fees to Brown of \$7,879.50, since those attorneys' fees were already compensated in the attorneys' fee award to Brown in May 1990. The trial court's gratuity to Brown is a double dip and duplicative recovery which cannot stand in this Appeal.

Finally, Richards is entitled to all of his reasonable attorneys' fees and costs incident to prosecuting this appeal before the Court.

It must be said in all candor that justice was not well served by the manner in which the trial judge conducted the post-appeal proceedings on attorneys' fees and costs in this matter, in taking over four and one-half years to resolve post-appeal attorneys' fees and then to arbitrarily and prejudicially err, ultimately entering a judgment for attorneys' fees and costs without specific findings and conclusions as required by this Court.

ARGUMENT

I. THE TRIAL COURT ERRED IN CALCULATING THE AWARD TO RICHARDS FOR FEES AND COSTS INCURRED THROUGH TRIAL

A. THE TRIAL COURT ERRED IN FAILING TO AWARD RICHARDS FEES FOR HIS SUCCESSFUL DEFENSE OF BROWN’S CONTRACT CLAIMS UNDER THE ASSET SALE AGREEMENT

On remittitur following the first appeal in this matter, Judge Rigtrup held that Richards was entitled to recover attorneys fees and costs of \$218,986.42 in connection with his affirmative claim for breach of the warranties contained in the Asset Sale Agreement, but refused to award Richards his attorneys fees and costs incurred in defeating Brown’s contract claims under the Asset Sale Agreement. The trial court erred and its award of attorneys fees must be reversed for error of law.

Both Brown and Richards brought contract claims under the Asset Sale Agreement. Brown brought three claims under the Asset Sale Agreement: the first for the sale of the first half of the assets, the second for the sale of the second half of the assets, and the third for a \$500,000 increase in the purchase price of the assets. Richards brought one claim under the Asset Sale Agreement for breach of the warranties found in the Agreement. The jury found against Brown on his three contract claims under the Asset Sale Agreement and for Richards on his breach of warranty claim under the Asset Sale Agreement. As this Court squarely held in Brown, based on the jury verdict, Richards “prevailed” within the meaning of the Asset Sale Agreement both on his affirmative claim for breach of warranty and in defeating Brown’s claims under the Asset Sale Agreement. Add. A, 840 P.2d at 155.

The Asset Sale Agreement contains an attorneys fee provision which states:

In the event suit is brought to enforce the provisions of this agreement, the prevailing party in such an action shall be entitled to recover its reasonable attorney's fees and costs incurred in connection therewith.

Ex. P6 at 33 (Emphasis added.).

As a result of this Court's decision in Brown it is the law of the case that Richards is entitled to recover not only his attorneys fees and costs incurred in prosecuting his breach of warranty claim, but also those incurred in defending against Brown's primary contract claims. Add. A, 840 P.2d at 154-55 and n. 9 (Richards defeated Brown's contract claims and is therefore clearly the prevailing party and entitled to attorneys fees in connection with Brown's suit brought to enforce the Asset Sale Agreement).

To establish lack of substantial performance, Richards had to do more than show that the assets differed in some minor way from what was promised. Instead, Richards had to establish a material difference in performance from that promised with respect to an essential aspect of the contract. M.U.J.I. 26:21; 26.40. Richards met his burden through proof that Brown grossly misrepresented the nature and value of the Interwest assets, both tangible and intangible. Richards used the same proof to establish Brown's breach of the Asset Sale Agreement warranties, as well as Richards' claims of fraud and negligent misrepresentation in connection with the sale. Even if Richards had brought no counterclaim, Richards still would have been required to put on all the evidence he had concerning Interwest's equipment, aircraft, contingent liabilities, inventory, accounts receivable, financial records,

profitability, prospects and reputation to establish a lack of substantial performance and to defeat Brown's contract claims. Richards' fees incurred in putting on this proof are clearly recoverable under Brown.

The only basis suggested by Judge Rigtrup for the failure to award Richards his clearly compensable fees was that proof of Richards' contract defense and his breach of warranty and fraud counterclaims overlapped. See Add. C at 3, ¶3. However, the common factual basis shared by Richards' successful defense of Brown's contract claims, Richards' breach of warranty counterclaim and Richards' fraud counterclaim is not a proper reason to deny Richards recovery of the fees incurred in prevailing on Brown's contract claims.²

In an analagous case, Sprouse v. Jager, 806 P.2d 219 (Utah App. 1991), appellant sold a motel through appellees, a real estate agent and his company. Before the commission had been fully paid, the buyer defaulted. In litigation initiated after buyer defaulted, appellant sought to foreclose the property. While appellant succeeded in foreclosing the property, appellees successfully intervened in the action and prevailed on a claim against appellant for recovery of the commission, which was to have been paid over time out of the sale proceeds.

²The trial court's erroneous refusal to award Richards fees for defeating Brown's claims for breach of the Asset Sale Agreement echoes its earlier refusal to enter judgment on the jury's verdict finding that Richards had not breached that Agreement. Instead the trial court entered judgment for Brown and against Richards on those claims. In spite of this Court's clear ruling in Brown that the trial court's judgment was in error, Judge Rigtrup through his fee award continues to deny that Richards was the prevailing party on those claims.

The trial court found appellees were entitled to attorneys fees under the Commission Agreement. Appellees' counsel testified that he spent one-third of his time asserting appellees' right to participate in the foreclosure, one-third defending appellant's claim to foreclose appellees' interest, and one-third collecting appellees' commission. While only the commission claim had a contractual basis for fees, the court awarded appellees all of their fees. Appellant appealed the attorney fee award, arguing that appellees should have received only one-third of the fee because two-thirds of the time related to non-compensable claims. Id. at 226. This Court affirmed the award of the entire amount, stating:

Although the minute entry is somewhat sketchy, it appears that Sprouse's objection is not to the number of hours or to the hourly rate, but rather it is to the fact that the court failed to separate out two-thirds of the attorney time that Sprouse considered to be irrelevant because it did not pertain to the [collection of the commission]. However, the court was satisfied that, because appellees prevailed on the counterclaim, the foreclosure, and the collection, they were entitled to the full amount. Because these complex issues were so intertwined, we find the court acted within its discretion in its award of attorneys fees.

Id. at 226.

In Sprouse, this Court affirmed an award of the prevailing party's fees, even though some of the fees may not have been incurred strictly on compensable issues because proof of the compensable and non-compensable claims were interrelated. Here, Richards seeks recovery not for intertwined but possibly non-compensable proof, but rather for the common factual basis of his successful contract defense and affirmative contract counterclaim and his fraud counterclaim. If the prevailing party in Sprouse was entitled to recover fees for proof of "intertwining" facts, clearly Richards is entitled to recovery for his presentation of the

common factual basis necessary to prove both his defense of Brown's contract claims and affirmative breach of warranty counterclaim, as well as his fraud counterclaim.³

The principle is also illustrated in Sunset Fuel & Engineering Co. v. Compton, 775 P.2d 901 (Or. App. 1989), where the lessor brought an action against lessee to recover damages for unpaid rent. Lessees counterclaimed for fraud. Lessor prevailed on both its claim and lessees' counterclaim, and was awarded its attorneys fees, including fees for defeating the counterclaim, based on an attorneys fees provision in the lease. Lessees appealed the award of fees, claiming lessor was not entitled to fees for defeating the counterclaim but only for prosecuting the claim for unpaid rent. The appellate court affirmed the award, holding that "[a]ttorney fees need not be apportioned when they are incurred for representation on an issue common to a claim in which fees are proper and one in which they are not." Id. at 904.

In Chrysler Corp. v. Weinstein, 522 So.2d 894 (Fla. App. 1988), appellant argued that appellee's fee award should have been reduced by the amount of time spent preparing claims

³There is absolutely no question that Judge Rigrup recognized the inseparability of Richards' contract defense, and breach of warranty and fraud counterclaims when it found that Richards was the prevailing party generally in connection with the sale of the Interwest assets. R4228 at 5409, 5412. Similarly this Court acknowledged the interrelationship of these claims when it found that Richards' \$500,000 fraud judgment should be set off against the \$900,000 contract price for the assets to determine what Brown could recover for the value of the assets. Given this use of Richards' fraud award by this Court, Richards could have appropriately argued that his fraud claim and award were so interrelated to his success on the Asset Sale Agreement that he is entitled to his fees for all time spent on his fraud claim, not just that spent developing the common factual basis of his contract defense and warranty and fraud counterclaims.

for which no statutory entitlement to fees existed. The appellate court affirmed the award of fees, holding that the trial court could award all fees without apportionment based on its finding that the causes of action were intertwined and arose out of a common base of facts. Id. at 898. See also Brinderson-Newburg v. Pacific Erectors, 971 F.2d 272 (9th Cir. 1992), cert. denied, 113 S.Ct. 1267 (1993) (party entitled to attorneys fees incurred in defending fraud and misrepresentation claims to extent fees were incurred litigating issues common to the contract claims.)

Finally, in First General Services v. Perkins, 918 P.2d 480 (Utah App. 1996), a subcontractor sought to foreclose a mechanics' lien against a homeowner, and the homeowner counterclaimed alleging negligent workmanship in performing the work. The subcontractor prevailed, and sought recovery of its fees incurred both in connection with the foreclosure of its lien and defense of the homeowner's counterclaim pursuant to statute. The trial court awarded fees on the foreclosure claim but refused to award fees under the mechanics' lien statute for defense of the homeowner's counterclaim. On appeal this Court reversed, holding the subcontractor was entitled to fees both in pursuing its affirmative claims and defending the counterclaim:

[W]e hold that the successful defense of counterclaims which would otherwise defeat the principal lien claim, in whole or in part, must necessarily be considered for the purpose of awarding attorney fees under the mechanics' lien statute. Logically, a lien holder must defend against such claims in order to "enforce" the lien. Nevertheless, the principal claim and counterclaims must be sufficiently tied together so that the right to enforce the lien would be defeated or diminished by the counterclaim.

918 P.2d at 486. Thus, in First General, this Court recognized that where the proof of a compensable and otherwise non-compensable claim are closely related, a successful party is entitled to recover its fees in proving all of the related facts, even though the proof also goes to an otherwise non-compensable claim.

Here, pursuant to this Court's explicit direction to the trial judge, Richards carefully segregated time spent only on non-compensable claims from the time spent on the proof of his successful defense to Brown's contract claims, which proof also went to Richards' breach of warranty and misrepresentation counterclaims. Despite this allocation, Judge Rigtrup failed to award Richards any fees and costs incurred in his successful contract defense. For the reasons set out in its previous decision in Brown and based on the controlling precedent of this Court, Richards is entitled to recover his fees incurred in prevailing against Brown's contract claim. The trial judge's award of attorneys fees must therefore be vacated and the case remitted for a calculation of the attorneys fees award, with directions that Richards should recover all fees and costs incurred in proving his defense to Brown's contract claims and that no reduction in his award should be made because proof of that defense also went to Richards' counterclaims.

B. THE TRIAL COURT ERRED IN FAILING TO AWARD RICHARDS ALL OF HIS FEES INCURRED IN CONNECTION WITH HIS BREACH OF WARRANTY COUNTERCLAIM

As this Court has already concluded as the law of the case, and as Judge Rigtrup acknowledged, Richards also prevailed under the Asset Sale Agreement on his breach of

warranty counterclaim, and as the prevailing party, was entitled to recover attorneys fees incurred in connection with his claim. Richards claimed and proved that Brown had breached a number of specific warranties found in the Asset Sale Agreement, including 1) that the financial statements fairly represented the financial condition and results of operations for Interwest, 2) that the assets were in good and serviceable condition, reasonable wear and tear excepted, 3) that the accounts receivable were 85% collectible, 4) that all taxes of Interwest due as of the date of closing had been paid, and 5) that Interwest had complied with, observed and performed all of its obligations and was not in default or breach of any oral or written agreement. In addition, Richards claimed and proved that Brown had breached the broader warranty that there were no misrepresentations or omissions made pursuant to the Asset Sale Agreement.

All of the evidence regarding the misrepresentations and omissions and the difference between the quality of assets promised and those delivered that was used by Richards in defeating Brown's contract claim and in establishing Richards' misrepresentation claims was also used by Richards in proving his breach of warranty claim. Even if Richards had not brought misrepresentation claims and Brown had not made a breach of contract claim, Richards would have been required to present the same witnesses and exhibits to prove his breach of warranty claim.⁴

⁴Although ordinarily it is not necessary to prove intent as an element of a breach of warranty claim, in this case the no misrepresentation warranty required Richards to prove that there were facts "known to Seller" which had not been disclosed and which could

In making his attorney fees claim, Richards demonstrated that he incurred approximately \$540,000 in connection with proving the set of facts which established his breach of warranty counterclaim and his defense to Brown's contract claims. Although Judge Rigtrup acknowledged Richards' right to fees in connection with his warranty claim, the court failed to award Richards the total amount incurred in proving the warranty claim. The findings of Judge Rigtrup make clear that the court felt that it must "allocate" time between the warranty claim, which the trial court deemed compensable, and the fraud claim, which was not. See Add. B at 3, ¶ 3. ("There was an overlapping of the warranty evidence and fraud evidence such that one could not allocate the time expended to one claim or the other with any degree of precision."). The trial judge insisted on this allocation despite his acknowledgment that proof of the two claims overlapped. Id. In fact, Richards relied on a common factual basis to prove both his breach of warranty and his fraud counterclaims, and therefore no allocation was necessary.⁵ See cases cited at 28-32.

Richards prevailed in his breach of warranty claim and the trial court erred as a matter of law in not awarding Richards all attorneys fees incurred in connection with that claim. The trial court's award of attorneys fees must therefore be vacated and remitted for a calculation of the amount due, with instructions to the subsequent trial judge to award

reasonably be expected to have a material adverse effect on the property, business or prospects of Interwest. Ex. P6, Section 5.1(n).

⁵The trial court's insistence on "allocating" Richards' fees between his various claims also ignored the fact that Richards' evidence of fraud and breach of warranty was used to prove Richards' successful failure of substantial performance defense. See Point IA above.

Richards all fees incurred in proving his breach of warranty claim, including the factual basis common to his breach of warranty and fraud claims and his failure of substantial performance defense.

C. THE TRIAL COURT'S AWARD OF ATTORNEYS FEES INCURRED THROUGH TRIAL MUST BE VACATED AND REMANDED BECAUSE THE COURT AGAIN FAILED TO ENTER DETAILED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT THEREOF

In its original judgment, the trial court found Richards to be the prevailing party in connection with the Asset Sale Agreement, and found that approximately 70% of the time and expenditures Richards incurred in the litigation were related to the disputes regarding the Asset Sale Agreement.⁶ In Brown, this Court remanded for a recalculation of attorneys fees due Richards, on the grounds that the trial court's findings and conclusions regarding the attorney fees awarded to Richards were "simply too sparse for [this Court] to determine whether the trial court made a permissible award." Add. A, 840 P.2d at 156. The Court found that the trial court had not made findings regarding, among other things, "what work was actually performed in relation to the contractual claims upon which Richards prevailed, and that it was necessary" or "the billing rate of Richards' counsel and the customary rate in this market." Id.

⁶Plainly when the trial court initially considered the issue of attorneys fees in May 1990, it understood that all of Richards' evidence in connection with the Asset Sale Agreement went to the claims for which attorneys fees were available: Brown's contract claims and Richards' breach of warranty counterclaim.

This Court provided specific guidelines to the trial court on remittitur:

When a party is contractually entitled to attorneys fees, the trial court's findings regarding those fees should be just as complete as its findings regarding other types of contractual damages. See Cottonwood Mall, 830 P.2d at 268. "These findings must be sufficiently detailed, and include enough subsidiary facts, to disclose the steps by which the trial court's decision was reached." Quinn, 830 P.2d at 286.

Id. at 157.

Consistent with this Court's direction in Brown, 840 P.2d at 156 and n. 12, on remittitur, Richards set out the total amount of fees he incurred in this matter, the attorney time, fees and costs allocable to claims for which there is an entitlement to attorney fees, and the attorney time, fees and costs allocable either to unsuccessful claims or claims for which he was not entitled to fees.⁷ Richards' evidence, including the expert evidence of Harold G. Christensen, regarding his fees was unrebutted. Brown did not challenge that the time sought had been actually spent, nor did Brown put on affirmative evidence to suggest that Richards' attorneys fees were inappropriately incurred. Brown challenged only isolated items in the bills,⁸ but the trial court did not adopt Brown's objections.

⁷The trial court claimed that Richards did not comply with this Court's directive that he allocate fees and costs incurred to successful compensable claims, unsuccessful compensable claims and non-compensable claims. In fact, Richards made the appropriate allocation but simply combined the second two categories (unsuccessful compensable claims and non-compensable claims) because he could not recover for attorneys fees or costs incurred for either category (except to the extent such proof also went to a compensable claim).

⁸For example, Brown elicited testimony from Mr. Naegle that some insurance companies will not pay for office conferences among attorneys. R6050 at 289. Brown also objected to being billed for one of Richards' counsel's flight from Sun Valley to Salt Lake

Brown also asserted that Richards' counsel had engaged in "block billing," which made it more difficult to apportion time between compensable and non-compensable claims. Brown's only affirmative evidence on this point was one witness, George Nagle,⁹ who testified that the insurance industry had required particularized billing since approximately 1989.

Brown's characterization is both inaccurate and unfair. First, most of the work on this case, including trial, took place from 1987 to 1989 when, even according to Mr. Naegle, attorneys ordinarily reported all work on a single day with one aggregate time entry. Second, Richards' bills contained significant detail regarding the tasks performed on a particular day. Third, while Richards' bills, themselves, did not distinguish the amount of time spent on any particular task, for most of the period for which fees were sought, Richards' counsel had maintained underlying records of the amount of time spent on particular tasks during each day and those records were used in allocating time. R6049 at 137-38; 144-48. Last, there was no evidence that billing practices in the insurance defense industry had set a standard of practice for billing in a complex commercial case involving multiple claims and counterclaims.

City for a hearing on the judgment in June 1991 when other of Richards' counsel were available. R6047 at 50-52.

⁹In his December 1996 Minute Entry, Judge Rigrup relied upon a second witness, David Thompson. Add. B at 5, ¶ 14. This is something the trial judge could not do, because he had excluded that very evidence, sustaining Richards' objection, when Brown sought to introduce such testimony. R6051 at 392-408.

Notwithstanding Richards' evidence of fees incurred and this Court's express instructions to the trial judge, on remittitur Judge Rigtrup again failed to provide adequate findings and conclusions to support his award of fees. Although the trial court did make findings that the rates charged and total time expended by Richards' counsel were reasonable, Add. C at 2-3, ¶¶ 1-2, the judge again failed to make any detailed findings regarding how it arrived at the amount of fees awarded and what work was performed in relation to the contractual claims upon which Richards prevailed. The trial court ignored Richards' detailed allocation of fees incurred between compensable and non-compensable claims, and instead simply halved the 70% figure it had used earlier, finding that approximately 35% of the fees incurred by Richards through the time of trial were reasonably allocated to the breach of warranty claim. Add. C at 6, ¶ 1. The trial court's lack of detailed findings, together with the fact that it simply gave Richards half of what it had previously awarded, emphatically underscore the arbitrary nature of the trial court's award.

The trial court abused its discretion in ignoring Richards' substantial and unrebutted evidence of compensable attorneys fees. The trial court's award of attorneys fees to Richards must therefore be vacated and the case remitted for a recalculation of the amount of fees due to Richards with instructions to the trial court to enter judgment for Richards for all fees and costs incurred in proving his substantial performance defense and breach of warranty claim, with detailed findings and conclusions in support thereof.

II. THE TRIAL COURT ERRED IN AWARDING RICHARDS ONLY 60% OF THE FEES AND COSTS INCURRED ON THE PRIOR APPEAL

In Brown, this Court stated:

A review of the issues on appeal reveals that they relate to the Interwest purchase agreement and that Richards was successful on each major issue discussed with the exception of his argument that he was entitled both to the \$500,000 fraud award and to forgiveness of his contractual debt. While Brown was successful in limiting the amount claimed by Richards on the fraud claim, Richards nevertheless prevailed on the issue of culpability and is therefore the prevailing party on appeal.

Add. A, 840 P.2d at 156. (Emphasis added.) This Court therefore held that fees were awarded “in general” to Richards, with the single exception of those fees expended in opposing Brown’s claim for fees incurred in defending against Richards’ efforts to rescind other contracts. Id.

In accordance with this Court’s directions, in his appellate fee application, Richards’ counsel eliminated all fees expended in opposing Brown’s claim for fees on rescission issues involving other contracts. R4542-47. Richards did not eliminate any time for opposing Brown’ Petition for Certiorari to the Supreme Court from this Court’s decision in Brown because all of the issues raised by Brown in the petition were issues on which this Court had held Richards to be the prevailing party.

Despite this Court’s instructions that Richards was the prevailing party on appeal and therefore entitled to all fees incurred on appeal with the exception of those going to the rescission issue, the trial court arbitrarily awarded Richards only 60% of his proven fees. The trial court did not challenge Richards’ expenditure of time and fees on appeal as

inappropriate in any way. Rather, the trial court concluded that Richards' allocation of fees made "no allowance for the fact that plaintiffs prevailed on many issues," and that awarding Richards only 60% of the requested fees reflected a more reasonable allocation of Richards' appellate fees. Add. C at 6, ¶ 2. This ipse dixit finding was based on the trial judge's conclusion that Brown had prevailed not only on the rescission issue addressed by this Court, but also "in gaining a remand on the issue of the fees awarded by the trial court to Richards through trial." Id. at 4, ¶ 10.

The trial court's conclusions are incorrect, and in addition, are in direct conflict with this Court's express holding regarding Richards' right to fees on appeal. First, this Court found that Brown prevailed only on the rescission issue, and that Richards was entitled to his fees incurred on appeal except for that issue. In addition, while the trial court characterized Brown as prevailing in gaining a "remand" on the issue of fees awarded by the trial court to Richards, that remittitur was based solely on the trial court's own failure to enter adequate findings and conclusions to support the award. Brown did not prevail in showing that the trial court erred in the amount of fees awarded; rather, this Court stated it could not review the award because of the dearth of findings and conclusions of the trial judge.¹⁰ Add. A, Brown, 840 P.2d at 156.

¹⁰Richards reduced his fees on appeal by approximately 3% for the rescission issue based on the amount of time and number of pages spent on that issue. It is irresponsible for the trial court to reduce Richards' fees by an additional 37% for its own failure to make necessary findings of fact and conclusions of law.

The trial court erred in awarding Richards only 60% of his fees incurred on the previous appeal. This award should be vacated and remanded with instructions to the trial court to enter an award for all fees and costs Richards incurred in the first appeal of this matter except those fees incurred on the rescission issue.

III. THE TRIAL COURT ERRED IN AWARDING RICHARDS ONLY 60% OF HIS POST-APPEAL FEES

On April 1, 1996, the trial court announced from the bench that Richards was not entitled to any of the \$75,113.80 in attorneys fees or \$3,055 in costs incurred from November 1, 1993 through February 1, 1995 in connection with his attorneys fees request, on the grounds that Richards had failed to allocate those fees. R5553-54. However, in its December 31, 1996 Minute Entry, the trial judge acknowledged that pursuant to Salmon v. Davis County, 916 P.2d 890 (Utah 1996) and James Constructors v. Salt Lake City, 888 P.2d 665, 674 (Utah App. 1994). Richards was entitled to an award of attorneys fees and costs incurred in proving his attorneys fee request. Then he did a volte face and awarded Richards only 60% of the amount incurred, or \$46,901.59. Add. B at 3-5.

In support of its award, the trial court found that Richards' counsel spent over 200 hours in attempting to allocate time expended in the case. Add. C at 3, ¶ 4. The trial court found that because Richards used "block billing", time could not be mechanically allocated through an internal accounting system. Add. C at 5, ¶¶ 14-15. As a result, the trial court determined that many needless hours were expended manually allocating time, a task that

could have been completed more easily had Richards' counsel kept their time by individual tasks. Add. B at 4. In so concluding, and consequently reducing by 40% the award to Richards for fees incurred in prosecuting his request for fees, the trial court plainly abused its discretion.

First, Judge Rigtrup's finding that counsel spent over 200 hours attempting to allocate time is without support. Rather it appears that the trial court included all time spent on preparing the fee application, including time spent preparing the written Motion for Amended Judgment and Memorandum in Support. R4613-858; 5251-99. The trial court's ruling also ignores the fact that while the invoices provided by Richards' counsel aggregated all time spent on any particular day by attorney, Richards' counsel had underlying time records of the amount of time spent on each task during the day. R6049 at 137-38; 144-48.

Second, while Richards easily established the amount of time spent on a particular day in preparing Richards' Answer and Third Amended Counterclaim, Richards was still required to allocate the time spent on that task between compensable claims addressed in that pleading (general factual development, answer to the Asset Sale Agreement contract claims and the Richards' breach of warranty counterclaim) and non-compensable claims (fraud and breach of fiduciary duty counterclaims). Similarly, in allocating trial time and trial preparation time, Richards had to allocate compensable and non-compensable time by reviewing which witnesses were testifying or being prepared and the issues to which their

testimony went. Id. at 146-48. However Richards' counsel kept their time records, this analysis could never be the unrealistic, "mechanical function" suggested by the trial judge.

Richards' counsel kept careful, detailed records of the time spent on this matter. Pursuant to this Court's instruction, on remittitur Richards painstakingly allocated the fees incurred between successful claims for which Richards was entitled to fees, and fees incurred on unsuccessful claims or successful claims which provided no basis for recovery of attorneys fees. Richards is entitled to recover all fees incurred in making that analysis. The trial court abused its discretion in awarding Richards only 60% of his attorneys fees incurred in proving the amount of fees to which he is entitled. The Court should reverse and order that judgment be entered for all fees incurred by Richards for post appeal work.

IV. RICHARDS IS ENTITLED TO RECOVER ALL OF HIS COSTS AND EXPENDITURES INCURRED AND IS NOT LIMITED TO THOSE COSTS ALLOWED BY UTAH R. CIV. P. 54

In its conclusions of law, the trial judge held that under the terms of the Asset Sale Agreement, Richards could recover only those costs allowed under Utah R. Civ. P. 54:

The language of the contract in question provides for recovery to the prevailing party of its reasonable attorneys fees and costs. The broader term "expenses" was not used in the contract. The court construes costs in its usual and ordinary meaning.

Add. C at 7, ¶ 5. This holding is flatly inconsistent with the earlier ruling of the trial court on costs as to Brown and therefore is in error and must be reversed.

In entering its first judgment in October 1990, the trial judge stated:

The Court observes the applicable contract provisions; specifically, the Court recognizes that a reasonable amount is to be awarded, and has provided specifically that the prevailing party is entitled to recover its reasonable attorneys' fees and costs incurred. Based upon that language, the Court concludes that it is appropriate to consider all costs and expenditures made in aid of the litigation, fees and costs; and not tax additional court costs as provided by the Utah Rules of Civil Procedure.

(Emphasis added.) R4228 at 5410-11. Notwithstanding its earlier ruling, when the trial court entered its findings and conclusions regarding Richards' attorneys fees and costs on remittitur, the trial court allowed Richards only those costs recoverable under Rule 54. In so doing, the trial court prejudicially erred.

The trial court's prior ruling regarding recoverable costs is the law of the case and governs the redetermination of Richards' fees. Under the law of the case doctrine, prior rulings in a case generally should be followed to avoid the delays and potential prejudice involved in rehearing previously decided issues. Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950, 969 (Utah App. 1989); Salt Lake City Corp. v. James Constructors, 761 P.2d 42, 45 (Utah App. 1988). Generally, reconsideration is proper only in circumstances not present here, such as where the matter is presented in a different light, the governing law has changed, new evidence is discovered, to prevent manifest injustice or to correct errors. State v. O'Neil, 848 P.2d 694, 697 at n.2 (Utah App.), cert. denied, 859 P.2d 585 (Utah 1993).

In this case, the trial court had no reason to reconsider its earlier ruling regarding costs. That ruling was not challenged. On the previous appeal, Brown challenged Richards' right to fees but did not challenge the trial court's ruling regarding how costs should be

defined under the terms of the Asset Sale Agreement.¹¹ In fact, here, reconsideration and change of the trial court's prior ruling regarding costs is patent discrimination and manifestly unjust. The trial court awarded Brown his costs on the basis of its standard.

This Court should therefore remit for recalculation of costs, with instructions that all costs and expenditures incurred on compensable claims be awarded.

V. THE TRIAL COURT ERRED IN AWARDING BROWN ADDITIONAL ATTORNEYS FEES FOR WORK ALREADY INCLUDED IN HIS APRIL 1990 AWARD

In its earlier opinion, this Court held Brown was entitled to an additional award of attorney fees for successfully defending Richards' attempt to rescind certain contracts unrelated to the sale of the Interwest assets, even if such efforts were not a significant portion of the overall lawsuit, and directed the trial court to consider such claims on remand. Add. A, 840 P.2d at 155. On remand, Brown sought and the trial court awarded \$7,879.50 in additional fees for Brown's efforts in enforcing the rental provisions of the Option Agreement, and resisting Richards' attempt to rescind the Exchange Agreement, which provided for an exchange of property as payment for the first half (later adjusted to 72%) of

¹¹Again, in seeking fees pursuant to the contract governing the sale of the Interwest building, Brown sought recovery of all of his costs, not only those available under Rule 54(b). R3556-57. He is therefore estopped from arguing Richards is not entitled to similar treatment in connection with his claim for fees pursuant to the contract governing the sale of the Interwest assets. Hill v. State Farm Mut. Auto Ins. Co., 829 P.2d 142, 148 (Utah App. 1991) (party may not take position contrary to earlier consistently held position).

the Interwest Building.¹² R5010-23; Add. C at 7, ¶ 4. This award is error. The trial court already compensated Brown for these efforts in its May 1990 fee award.

In Brown's 1989 trial brief related to the issues of interest, attorney's fees, and costs, Brown requested the fees expended in connection with his efforts to enforce the rental provisions of the Option Agreement as part of fees expended on real estate issues. R3549-50. In support of its finding that Brown was the prevailing party on the sale of the Interwest building, the trial court cited these efforts and Brown's award of rent under the Option Agreement. R4228 at 5409-10; 5412. The trial court specifically stated that Brown was the prevailing party because of the "amounts due Plaintiff on the building and the rents." Id. The trial court clearly considered Brown's recovery on that agreement and had already awarded Brown fees for work in connection with the recovery of rents. Brown is not entitled to a double dip and duplicative recovery. Judge Rigtrup's award of supplemental fees to Brown under the Option Agreement must be reversed.

Brown was also compensated for the fees he expended in connection with Richards' efforts to rescind the Exchange Agreement. The Exchange Agreement was fully performed prior to the initiation of litigation, but Richards' fraud and breach of warranty claims raised questions regarding the entire real estate transaction, including Richards' purchase of both parts of the building. In its May 1990 fee award, the trial court ruled, based on the jury's

¹²Although Brown also mentioned the Purchase Agreement for a Gulfstream Commander aircraft in his Motion for Supplemental Fees, the fee affidavit submitted with the Motion did not include any time spent in litigating that Agreement. R5020-34.

findings, that Brown was “the prevailing party on the sale of the Interwest Building,” R4228 at 5410, and awarded attorneys fees to Brown on that basis.¹³ The trial court did not limit its finding or its award of fees to Brown only to Richards’ exercise of the option to purchase the second part of the building, but rather considered the transaction as a whole. In addition, the trial court specifically considered Brown’s costs incurred in defending against Richards’ claim for rescission, which remained in the suit “for a considerable time” and “created substantial and unnecessary fees to [Brown]”, in fashioning Brown’s 1990 fee award. *Id.* 5411. Thus, to the extent Brown prevailed under the Exchange Agreement by defeating Richards’ rescission claim, he has already obtained an award of fees for his efforts as the prevailing party on the entire transaction. The award of supplemental fees to Brown is entirely duplicative and should be reversed.

IV. RICHARDS IS ENTITLED TO ATTORNEYS FEES AND COSTS ON THIS APPEAL

This Court has previously found that Richards was the prevailing party on his earlier appeal. This appeal has been necessitated by Judge Rigtrup’s failure to comply with the instructions of this Court in Brown, in particular 1) the instructions to calculate attorneys fees due to Richards as the prevailing party under the Asset Purchase Agreement, and to enter

¹³The interrogatories to the jury treated the building sale as one transaction, not two, and asked the jury to determine whether “Richards breached his agreement to purchase the Interwest building from Brown.” R2808-21.

findings of fact and conclusions of law in support thereof, and 2) the instructions to award Richards his appeal fees as the prevailing party on appeal. Because Richards is still attempting to enforce his right to attorneys fees as the prevailing party under the Asset Sale Agreement, he is entitled to his fees on this appeal as well.

CONCLUSION

This Court should vacate the award of attorneys fees and costs to Richards and remit to the trial court, now Judge Henriod, for recalculation of attorneys fees due Richards for 1) trial fees through April 1990, 2) fees on first appeal and 3) fees incurred post appeal, with instructions that Richards is entitled to all attorneys fees incurred in connection with his successful defense to Brown's contract claims, together with all fees incurred on his successful breach of warranty claim, without any reduction based on the common factual basis between his compensable and non-compensable claims; that Richards is entitled to all fees incurred on the initial appeal in Brown; and that Richards is entitled to all fees incurred in the trial court in making his fee applications.

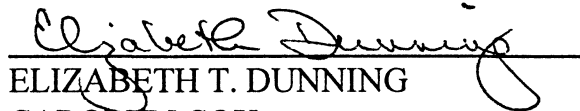
In addition, this Court should vacate the award of costs and remit for recalculation of the costs due Richards in the trial court and on appeal, with instructions to the trial court that in awarding costs, it should use the same definition of costs applied by the trial court in its May 1990 attorneys fee award to Brown.

This Court also should reverse the award of supplemental attorneys fees to Brown. Finally, Richards is entitled to all his reasonable attorney fees and costs incurred or associated with this appeal.

Respectfully submitted,



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